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In the Supreme Court of the United States

OCTOBER TERM, 1943

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 32–39) is reported in 48 F. Supp. 15. The opinion of the Circuit Court of Appeals (R. 50–54) is reported in 140 F. 2d 608.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 23, 1944 (R. 54). The petition for a writ of certiorari was filed May 12, 1944. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the State of New York and its agencies are entitled to immunity from the Federal excise taxes imposed by Section 615 (a) (5) of the Revenue Act of 1932 in respect of certain mineral and table waters bottled and sold by the agencies.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

ARTICLE I.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * * *

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Revenue Act of 1932, c. 209, 47 Stat. 169:

TITLE IV—MANUFACTURERS' EXCISE TAXES

* * * * * *

SEC. 615. TAX ON SOFT DRINKS.

(a) There is hereby imposed—

* * * * * *

(5) Upon all natural or artificial mineral waters or table waters, whether carbonated or not, and all imitations thereof, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 12½ cents per gallon, a tax of 2 cents per gallon.

* * * * * *

STATEMENT

This is a suit by the United States to collect taxes, interest and penalties assessed on the bottling for sale and sale in closed containers of natural mineral and table waters at a price in excess of 12½ cents per gallon by the Saratoga Springs Commission and the Saratoga Springs Authority during the period June 21, 1932, to May 10, 1934, inclusive (R. 15–16).

The Saratoga Springs Commission (hereinafter referred to as the Commission) is a public commission of the State of New York (hereinafter referred to as the State), which was created in 1930 as a temporary commission for a term of seven years and continued in 1937 as a permanent commission (R. 16). The Saratoga Springs Authority (hereinafter referred to as the Authority) is a public benefit corporation of the State created in 1933 to take over the management of a State Reservation at Saratoga Springs (hereinafter referred to as the Reservation) by lease from the Commission (R. 16). The Authority was established in order to obtain

a loan from the Reconstruction Finance Corporation to aid in the further development of the Reservation for public health purposes in accordance with the declared policy of the State (R. 16).

During the period June 21, 1932, to May 10, 1934, inclusive, the Commission and Authority bottled for sale and sold in closed containers certain natural mineral and spring waters at a price in excess of 12½ cents per gallon to various vendees within and without the State (R. 17). Returns disclosing the amount of tax payable, if due, on the sales made during this period were filed under protest with the Federal Collector of Internal Revenue at Albany, New York (R. 17). The returns were filed by the Commission for the period June 1932 to September 1933, inclusive, and by the Authority for the period, October 1933 to May 1934, inclusive (R. 17). A statement was attached to each return that no tax was due upon the ground that the sale of the waters by the State was the exercise of a governmental function (R. 17). The taxes in the amounts disclosed by the returns, together with interest and penalties, were assessed by the Commissioner of Internal Revenue and notices and demands for payment were issued upon the proper parties (R. 17), but no part thereof has been paid (R. 19).

The waters, the bottling and sale of which gave rise to the instant controversy, came from min-

eral springs on the Reservation in the vicinity of Saratoga Springs, New York (R. 19). The waters are characterized by a supersaturation of carbon dioxide gas, and contains, in various quantities and combinations, minerals in solution, the most common of which are salt, soda, calcium, magnesium, and iron in the form of chlorides and bicarbonates (R. 19). These waters have been drunk and also used for bathing purposes by large numbers of people from colonial times (R. 19–20). They have a recognized medical value and are prescribed by physicians both for bathing and internal use (R. 20).

Commencing in 1911 the State acquired all of the then existing springs (R. 20). Title to all lands from which the springs flowed or spouted was taken and remains in the name of the State (R. 20). Jurisdiction over the springs were transferred in 1930 to the newly created Saratoga Springs Commission, the legislature declaring its purpose to be to develop the Reservation as a state health resort and spa for public health purposes (R. 21). For ten years prior to 1930 waters from the springs were bottled and sold by a private corporation under a lease from the State. (R. 22.) This lease had 15 years to run when the State purchased the lessee's rights, constructed a modern and efficient bottling works and took over the bottling and sale of the waters (R. 22).

The waters bottled and sold consist of three mineral waters and one plain water of high chemical and vegetable purity. (R. 22.) Proceeds from the sales amounted to $104,434.98 for the fiscal year 1933 and $101,675.80 for the fiscal year 1934 (R. 23). In addition to the waters sold, large quantities were consumed on the Reservation free of charge at the springs and at various drink pavilions and upon payment of admission fees, at two drink Halls (R. 23). The sales of the bottled water were made through distributors and retailers and by direct shipment to consumers (R. 23). Advertising amounted to $29,607.98 and $18,392.62 for the fiscal years 1933 and 1934 respectively (R. 24).

In the annual report of the Commission and Authority for the fiscal year 1936, the need for promotion of the spa was stressed, and it was asserted that the average of $30,130.23 per year spent during the past five years for this purpose had been wholly inadequate in comparison with expenditures of other institutions in similar fields (R. 25). The following is an excerpt from the report (R. 25–26):

> White Rock spends $400,000 a year. French Lick Springs spends on Pluto Water and the hotel $300,000 a year. The Greenbrier, at White Sulphur Springs, West Virginia, spent $44,215 last year, and the Homestead at Virginia Hot Springs, $30,000. One hotel at Hot Springs, Arkansas, The Arlington, spent $20,000 in ad-

vertising its baths. The Bernard McFadden "health" hotel at Dansville, N. Y., spent $90,491 last year. Foreign waters and products spent similar sums in our own market. Carlsbad products spent $80,285 last year over the radio alone in promoting the salts derived from the Czecho-Slovakian waters, with an additional $4,875 in magazine advertising. Vichy Celestin Water spent $25,000 in New York City alone.

It must be borne in mind that expenditures at Saratoga have been for the Spa and its waters both, in spite of the fact that they are distinct and should be promoted individually; the Spa offering services and waters being a product. * * *.

None of the watering places or spas referred to above and located in the United States is owned or operated by the Federal Government or by any state, state commission or authority or political subdivision, and the parties know of none which is so operated (R. 28). Several of these privately owned spas have bottled and sold mineral waters to the general public (R. 28).

In addition to the foregoing matters it should perhaps be noted that there are many facilities at the Reservation available to the citizens of New York State and the public generally on equal terms (R. 30). Fees are charged for admission to the drink halls, bath houses, recreation center, and the summer theatre, except for charity treatments administered at the bath houses (R. 30).

The largest items of income are the receipts from admissions to the bath houses and from sales of bottled waters, but the largest item of net income is derived from the lease of the property known as the Gideon Putnam Hotel Sanitarium (R. 31). The Authority also operates a bus line from the City of Saratoga Springs to certain of the baths and facilities located about two miles south of the downtown section of the city and charges fares for such transportation (R. 29, 31). Also located on the Reservation are an administration and research laboratory, and a recreation center with swimming pool, golf course, outdoor gymnasium and other facilities for outdoor recreation (R. 29).

The District Court found as ultimate facts that in bottling for sale and in selling mineral and table waters the State and its agencies embarked in a business which would normally be taxable, that the activities so conducted by the State and its agencies had the characteristics of a business enterprise and that the waters were sold in competition with private waters (R. 40). Accordingly the Court concluded that the State and its agencies were not entitled to immunity from Federal taxation by virtue of the provisions of the Federal Constitution (R. 40). From the judgment in favor of the United States (R. 42–43) an appeal was taken to the United States Circuit Court of Appeals for the Second Circuit (R. 46–

47), which sustained the judgment below (R. 50-54).

ARGUMENT

The decision below is clearly supported by *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Allen* v. *Regents*, 304 U. S. 439. Those cases establish that when a State[1] engages in a business in competition with private persons it is similarly subject to Federal taxation; and that this result is not affected by the fact that the activity is a means adopted for carrying on a governmental function.[2] See also *State of California* v. *Anglim*, 129 F. 2d 455 (C. C. A. 9th), certiorari denied, 317 U. S. 669.

Petitioners urge as a distinction that in the instant case the State is engaged in the disposition of its natural resources. This case involves no isolated disposition of natural resources but an active business originated by private persons (R. 22). In any event, as the District Court pointed out (R. 38), the natural resources are

[1] While the State was joined as a defendant its precise connection with the matter was in doubt (R. 4). By its answer the State admitted that the other defendants were its agencies (R. 9). It has been stipulated that the Commission and the Authority actually conducted the business (R. 17).

[2] Our conception of a governmental function, of course, does not include the bottling and sale of mineral waters. However, the *Regents* case (304 U. S. at p. 449) makes it plain that the acceptance of such classification would not change the decision.

not being disposed of as such. The mineral waters were put through a bottling process to preserve them and then sold in competition with private waters. The unbottled mineral waters which were given or sold to the public at the Reservation are not involved.

The relationship of the bottling and sale of the mineral waters to the State's program of conservation, health and welfare is no more important than the relationship of the athletic contests to the Georgia program of public education in the *Regents* case, *supra*. Although the admissions tax in that case was payable by the public, the exaction sustained by this Court was a penalty imposed directly upon an instrumentality of the State for failure to collect the tax (304 U. S. 449).

CONCLUSION

There is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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